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17 UNITED STATES DISTRICT COURT
18 NORTHERN DISTRICT OF CALIFORNIA
19 SAN FRANCISCO DIVISION
20

21) CR 08-0160 SI
22) UNITED STATES OF AMERICA,) GOVERNMENT'S OPPOSITION TO DEFENDANT
23) Plaintiff,) COTA'S MOTION TO SEVER CHARGES
24) v.) AGAINST DEFENDANT FLEET MANAGEMENT
25) JOHN JOSEPH COTA, and) LIMITED
FLEET MANAGEMENT LIMITED,) Date: September 22, 2008
26) Defendants) Rime: 11:00 a.m.
27)) Judge: Hon. Susan Illston
28) Speedy Trial Act: Time excluded through
disposition 18 U.S.C. § 3161(h)(1)(F)

1 INTRODUCTION

2 This case centers on the *M/V Cosco Busan*'s November 7, 2007, allision with the Bay
3 Bridge and the resulting oil spill and migratory bird deaths. Both the ship's pilot –
4 Captain John Cota – and operator – Fleet Management Limited (Fleet) were charged in a
5 July 22, 2008, second superseding indictment with several violations, including violations
6 of the Clean Water Act and the Migratory Bird Treaty Act. There is substantial evidence
7 in the evidence that will be introduced against each of the defendants.

8 In a motion filed on August 22, 2008, Captain Cota has asked to sever his and Fleet's
9 trials. Captain Cota argues that (1) Captain Cota and Fleet have inconsistent defenses, (2)
10 Fleet's defense, which includes information regarding Captain Cota's medical condition
11 and medication regime, manifestly prejudices Captain Cota, and (3) a joint trial will allow
12 Fleet to introduce evidence of Captain Cota's alleged false statements on January 2006,
13 and January 2007, which the Court has previously ruled are inadmissible in a separate
14 trial.

15 The United States opposes Captain Cota's motion for the following reasons:

- 16 • The motion is premature, because at this stage, the description of Fleet's
17 anticipated defense is conjecture;
- 18 • Captain Cota and Fleet do not have mutually antagonistic or irreconcilable
19 defenses;
- 20 • Any reliable, relevant, evidence of Captain Cota's medical condition or medication
21 regime that the Court would allow Fleet to introduce in a joint trial would also be
22 admissible in a separate trial;
- 23 • To the degree that Fleet is allowed to present medical evidence that would not be
24 admissible in a separate trial, any undue prejudice can be cured by a limiting jury
25 instruction; and,
- 26 • judicial economy is best served by one trial, given the overlap of evidence and
27 witnesses.

FACTUAL BACKGROUND

Captain Cota and Fleet are charged with negligently discharging harmful quantities of oil in violation of the Clean Water Act, 33 U.S.C. §§ 1319(c)(1), 1321(b)(3). Both Captain Cota and Fleet can be held negligently liable for the same discharge of oil. *See* Restatement (Second) of Torts § 432 (1965).

The indictment alleges the following nine negligent sets of acts to both Fleet and Captain Cota:

1. Fleet and Cota failed to navigate an allision free course;
2. Fleet and Cota failed to prepare and review an adequate passage plan before departure;
3. Fleet and Cota failed to conduct an adequate review with the Pilot, Master and crew of the *M/V Cosco Busan* before departure of the official navigational charts, the proposed course, the location of the San Francisco Bay aids to navigation, and the operation of the vessel's navigational equipment;
4. Fleet and Cota departed in heavy fog;
5. Fleet and Cota proceeded at an unsafe speed during the voyage despite limited visibility;
6. Fleet and Cota failed to use the vessel's radar while making the final approach to the Bay Bridge;
7. Fleet and Cota failed to adequately read and operate the vessel's electronic chart while making the final approach to the Bay Bridge;
8. Fleet and Cota failed to adequately use the vessel's paper charts by failing to record and review positional fixes during the voyage;
9. Fleet and Cota failed to verify the vessel's position in relation to other established and recognized aids to navigation throughout the voyage.

The indictment also alleges that Fleet separately: (1) failed to adequately train the Master and crew of the *M/V Cosco Busan*, including with regard to voyage passage planning, the role of the Master and crew with a pilot, the ship's navigational procedures and the ship's navigational equipment, including the ship's electronic chart system; (2) failed to ensure that adequate lookouts were posted during the voyage; and (3) failed to notify the Pilot when the vessel went off course while making the final approach to the Delta-Echo span of the Bay Bridge.

The evidence against Captain Cota and Fleet is largely the same. At a separate trial for either defendant, the United States would seek to introduce the following:

- background information on sailing in the San Francisco Bay,
- information regarding the weather conditions on the morning of November 7, 2007,
- a full rendition of the *M/V Cosoc Busan*'s transit from the Oakland inner-harbor to the Bay Bridge, a playback of the radar, radio traffic and electronic chart during the transit, and
- information about the clean-up after the allision.

Captain Cota is also charged with making false statements in his January 2006, and January 2007, merchant mariner physical examination report. These false statements are not alleged to be a cause of the November 7, 2007, oil spill and the Court severed these charges from the Clean Water Act and Migratory Bird Act charges.

The indictment does not allege that Captain Cota's medical conditions or medications caused the discharge on November 7, 2007. Fleet has suggested that Captain Cota's medical conditions or medication regime contributed to the November 7, 2007, oil spill. Neither the United States nor Fleet has formally moved to admit evidence of Captain Cota's medical condition or medication regime, and the Court has yet to rule on whether this evidence is reliable, relevant or admissible.¹

LAW

Rule 8(b) of the Federal Rules of Criminal Procedure provides that defendants may be charged together “if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses.” Rule 14 of the Rules, in turn, permits a district court to grant a severance of defendants if “it appears that a defendant or the government is prejudiced by a joinder.”

¹Evidence of Captain Cota's medical condition and medication may be relevant to Fleet's defense only if it negates the government's proof that Fleet failed to exercise reasonable care and this failure was a cause in fact and a proximate cause of the oil spill. *See United States v. Hanousek*, 176 F.3d 116 (1999).

1 The federal system has a preference for joint trials of defendants who are indicted
 2 together. *Zafiro v. United States*, 506 U.S. 534, 537 (1993) Joint trials play a vital role in
 3 the criminal justice system. *Id.* They promote efficiency and serve the interests of justice
 4 by avoiding the scandal and inequity of inconsistent verdicts. *Id.* at 538. Courts have
 5 repeatedly approved of joint trials. *Id.*

6 Courts may grant a severance when mutually antagonistic or irreconcilable defenses
 7 are *unduly* prejudicial. *Id.* Antagonistic defenses "are not prejudicial per se." *Id.* at
 8 538. Mere "antagonism between defenses or the desire of one defendant to exculpate
 9 himself by inculpating a co-defendant . . . is insufficient to require severance." *United*
 10 *States v. Throckmorton* 87 F.3d 1069, 1072 (9th Cir. 1996). Similarly, inconsistency in
 11 defense positions is insufficient to warrant severance. *United States v. Tootick*, 952 F.2d
 12 1078, 1081 (9th Cir.1991). Courts have reversed few convictions for failure to grant a
 13 severance on grounds of mutually antagonistic or irreconcilable defenses. *Zafiro* at 238.
 14 And, the Supreme Court has declined to adopt a bright line rule mandating severance
 15 whenever co-defendant have conflicting defenses. *Id.* at 539.

16 To warrant severance based on antagonistic defenses, co-defendants must show that
 17 their defenses are irreconcilable and mutually exclusive. *See United States v. Sherlock*,
 18 962 F.2d 1349, 1363 (9th Cir.1992). Defenses are mutually exclusive when "acquittal of
 19 one co-defendant would necessarily call for the conviction of the other." *Tootick*, at 1081.
 20 An oft-repeated formulation in the Ninth Circuit is: "To be entitled to severance on the
 21 basis of antagonistic defenses, a defendant must show that the core of the co-defendant's
 22 defense is so irreconcilable with the core of his own defense that the acceptance of the co-
 23 defendant's theory by the jury precludes acquittal of the defendant." *Throckmorton*, at
 24 1072.

25 Rule 14 does not require severance even if prejudice is shown, but rather, "leaves the
 26 tailoring of the relief to be granted, if any, to the district court's sound discretion." *Zafiro*
 27 at 539. Generally the "risk of prejudice posed by joint trial can be cured by proper
 28 instruction." *United States v. Hanley*, 190 F.3d 1017, 1027 (9th Cir. 1999)(citations and

1 internal quotes omitted).

2 ARGUMENT

3 Captain Cota makes three arguments for why a severance is appropriate. First, Cota
 4 argues that his and Fleets defenses conflict. Second, Cota argues that Fleet will seek to
 5 introduce evidence regarding Captain Cota's medical condition and medications, and that
 6 evidence, Captain Cota argues, would be manifestly prejudicial. Finally, Captain Cota
 7 argues that Fleet will seek to introduce evidence of Captain Cota's false statements to the
 8 Coast Guard. Each of these arguments are discussed below.

9 **1. Captain Cota and Fleet's Defenses are Not Mutually Antagonistic**

10 Captain Cota's argument that his and Fleets defenses are mutually antagonistic is
 11 unpersuasive. First, neither Captain Cota nor Fleet have revealed their defense at trial.
 12 Until they do, Captain Cota's prediction of Fleet's defense is too speculative to conclude
 13 that their defenses are antagonistic.

14 Next, even if Captain Cota's prediction about Fleet's defense is correct, the defenses
 15 are not mutually antagonistic. Captain Cota suggests that Fleet will argue that he was
 16 negligent. Structurally there is nothing antagonistic about each defendant arguing that the
 17 other defendant was negligent. It does not follow that if one party is negligent the other is
 18 or is not negligent. Here neither party, one party or both parties can be found negligent.
 19 This case is not like a case where only one defendant could have pulled the trigger. Thus,
 20 the two defenses are not "irreconcilable and mutually exclusive." See *United States v.*
 21 *Sherlock*, 962 F.2d 1349, 1363.

22 Captain Cota further suggests that Fleet will argue that "there was no visible evidence
 23 of Captain Cota's inability and thus the crew was blameless in failing to stop him." (Def.
 24 Mem. at 7) This too is not a mutually antagonistic defense. A jury can accept Fleet's
 25 argument that Captain Cota showed no visible signs of incompetence, and still acquit
 26 Captain Cota.

27 **2. A Joint Trial will Not Lead to the Introduction of Prejudicial Information**

28 Captain Cota's argument that Fleet will seek to introduce prejudicial evidence

1 regarding his medical condition and medication regime is similarly unconvincing. Here
 2 too, the argument is too speculative to be the basis for a severance ruling. Since Fleet has
 3 not revealed the evidence they will seek to introduce at trial, it is impossible to determine
 4 if the anticipated evidence is unduly prejudicial. Medical evidence is, of course, not *per*
 5 *se* prejudicial.

6 Assuming it is Fleet's intention to introduce medical evidence, the Court has yet to
 7 rule on its reliability, admissibility or relevance. If evidence of Captain Cota's medical
 8 condition and medication regime is relevant to Captain Cota's negligence, then
 9 presumably it would be admissible both in the United States case in chief in a joint trial
 10 against both defendants or in separate trial against Captain Cota. In that case, the
 11 evidence is not unduly prejudicial and severance is not necessary. If, however, medical
 12 evidence is unreliable or irrelevant to whether Captain Cota was negligent, it should be
 13 inadmissible whether sponsored by Fleet or the United States in a joint trial or the United
 14 States in a separate trial. If the medical evidence is inadmissible, then severance is not
 15 needed.

16 Captain Cota further suggests that Fleet will introduce medical evidence to account
 17 for the lack of visible signs of Captain Cota's incompetence. (Def Mot. at 7) While this
 18 theory is speculation and may not be presented to the court, it does not appear to be an
 19 adequate basis for admitting medical evidence. Medical evidence is irrelevant to whether
 20 the crew saw or Captain Cota exhibited "visible evidence of his inability". The overt
 21 signs of being incapacitated either did or did not exist, regardless of Captain Cota's
 22 medical issues. If Captain Cota displayed no signs of incompetence, the medical
 23 evidence, at most, explains the discrepancy between how he acted and what he displayed.
 24 However, it is not evidence of whether there were overt signs of incompetence. The
 25 medical reason for why Captain Cota allegedly did not show visible signs of his inability
 26 is irrelevant to the case.

27 To the extent that the Court might allow Fleet to introduce medical evidence that it
 28 would not allow the United States to introduce in its case-in-chief, the Court can prevent

1 any undue prejudice with a limiting jury instruction.

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3 **3. Fleet Should not be Allowed to Admit Captain Cota's January 2006 and**
 4 **January 2007 False Statements**

5 Finally Captain Cota's argument that Fleet will try to introduce Captain Cota's alleged
 6 false statements is unpersuasive. Here the court has ruled that Captain Cota's statement
 7 in January 2006 and January 2007 are irrelevant to his actions on November 7, 2007. The
 8 Court's earlier ruling regarding the admissibility of the January 2006 and January 2007
 9 false statements in a separate trial should apply equally to a joint trial.

10 **4. The Cases Captain Cota's cites are Not Persuasive**

11 Captain Cota cites two Ninth Circuit cases in support of his motion – *United States v*
 12 *Tootick* 972 F.2d 1078 (9th Cir. 1991) and *United States v. Mayfield*, 189 F.3d 895 (9th
 13 Cir. 1999). Both cases are distinguishable. In both cases, unlike here, the defense
 14 presented mutually exclusive defenses, defense counsel introduced inadmissible evidence
 15 or made improper arguments and the court did not adequately intervene.

16 The *Tootick* case, unlike the present case, is a classic case of mutually exclusive
 17 defenses. The case involved two defendants – Charles Frank and Moses Tootick charged
 18 with a single stabbing. The only people present at the stabbing were the two defendants
 19 and the victim. There was no suggestion that the victim injured himself. Thus, only one
 20 person could have committed the stabbing. At trial Frank testified that Tootick
 21 committed the stabbing on a hillside while he, in a car, watched in horror. Tootick, in
 22 turn, argued that Frank committed the stabbing while he, in a drunken stupor was either
 23 passed out or asleep. The Ninth Circuit found that the trial should have been severed
 24 because “[e]ach defense theory contradicted the other in such a way that the acquittal of
 25 one necessitated] the conviction of the other.” *Id.* at 1081.

26 Standing alone the contradictory defense theories, in *Tootick* would not have merited
 27 a severance. The court's conclusion to reverse rested, not on the existence of antagonistic
 28 defenses, but “on the number and types of prejudicial incidents that were not corrected by

1 instructions from the court.” *Id.* at 1083. The court cites several examples of the defense
 2 counsel making unsubstantiated claims about the co-defendant and the court’s failure to
 3 instruct. For example, the court cites Tootick’s opening statement, which contained
 4 “unbridled accusations” few of which were proved at trial. The court comments on the
 5 trial judge’s failure to make any “admonitory comment or give an “additional
 6 instruction.” *Id.* 1083-1084. The Ninth Circuit notes that “[w]ith proper limiting
 7 instructions, even the admission of a nontestifying co-defendant’s confession can be found
 8 not to create prejudice.” *Id.* at 1085. Thus, unlike the present case, *Tootick* involved truly
 9 mutually antagonistic defenses exacerbated by improper arguments and anemic
 10 instructions.

11 The *Mayfield* case is similarly distinguishable from the present case. In *Mayfield*, the
 12 police found crack cocaine on a kitchen table where they had just seen the two co-
 13 defendants sitting. One defendant – Manyale Gilbert – gave a confession which also
 14 implicated Jerry Mayfield. At trial Gilbert argued that the drugs belonged exclusively to
 15 Mayfield. To make his argument, Gilbert’s attorney disregarded two pretrial rulings and
 16 elicited two hearsay statements implicating Mayfield. As in *Tootick*, the *Mayfield* trial
 17 court failed to give adequate instructions.

18 In a pretrial ruling the court admitted Gilbert’s statement on the condition that
 19 references to Mayfield be redacted. At trial, Gilbert’s attorney elicited testimony from a
 20 police officer making it apparent that Gilbert’s confession implicated Mayfield. The
 21 court, however, failed to give a limiting instruction telling the jury that the statements
 22 only applied to Gilbert. Gilbert’s attorney again “flouted the district court’s pretrial
 23 decision,” *id* at 899, and elicited testimony that the search warrant was based on a
 24 confidential informant who explicitly named Mayfield. Neither Gilbert nor the
 25 confidential informant testified, and Mayfield was precluded from cross-examining
 26 Gilbert nor the confidential informant on their statements implicating him. In closing
 27 Gilbert’s counsel forcefully reinforced the erroneously admitted evidence.

28 On review the Ninth Circuit found the “core of the codefendant’s case [was] so

1 irreconcilable with the core of Mayfield's own defense that the acceptance of the co-
 2 defendant's theory by the jury precluded] acquittal of the defendant. *Id.* at 900 (citations
 3 and internal quotations omitted). More troubling, however, the joint trial "compromised a
 4 specific trial right the right to confront witnesses." *Id.* (Citations and internal quotations
 5 omitted). The Ninth Circuit found that the prejudice came not from antagonistic defense,
 6 but rather, "from the interplay between the informant's statement, Gilbert's out-of-court
 7 confession, and Gilbert's counsel closing argument. *Id.* at 905.

8 Despite these problems the Ninth Circuit found that the district court could have either
 9 "sever[ed] or use[d] more rigorous and timely jury instructions to mitigate the prejudice."
 10 *Id.* at 906.

11 The present case unlike *Tootick*, and *Mayfield* does not involve mutually exclusive
 12 defenses. And, unlike *Tootick*, and *Mayfield*, here the potential problems of unbridled
 13 accusations can be remedied with proper instructions and admonitions.

14 **4. Judicial Economy Dictates One Trial**

15 Given the lack of undue prejudice to Captain Cota should the two defendants be tried
 16 together, judicial economy is also best served by one trial. The case against both
 17 defendants is primarily a negligence case. As such, almost all of the evidence will be the
 18 same for both defendants. The witnesses will be the same, including the six crew
 19 members currently detained. Any expert witnesses will be the same. The exhibits will
 20 also be the same, both documentary evidence as well as the computer software necessary
 21 to show the jury the complete transit of the *M/V Cosco Busan* from the Port of Oakland to
 22 the allision with the Bay Bridge. To present the exact same evidence in two separate
 23 trials would not best serve the interests of the Court or the government.

24 **CONCLUSION**

25 The United States opposes defendant Cota's motion to sever because Captain Cota
 26 and Fleet do not have mutually antagonistic defenses, any statements about what evidence
 27 would be admissible at a joint trial, but inadmissible at a separate trial is extremely
 28 speculative, any prejudice can be cured by a limiting instruction, and judicial economy is

1 best served. Accordingly, the government respectfully requests that the Court deny
2 Captain Cota's motion to sever.

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4 Respectfully submitted,

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15 DATED: September 12, 2008

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